No. 78-849

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY ZIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1978. A petition for rehearing was denied on October 26, 1978 (Pet. App. 20a). The petition for a writ of certiorari was filed on November 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to comply with the district court's order for a bill of particulars and if so, whether that failure prejudiced petitioner's defense.

2. Whether the trial court committed plain error in instructing the jury on accomplice testimony.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to receive, conceal, and dispose of 1400 stolen television sets, in violation of 18 U.S.C. 371 and 2315.[1] Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-19a).

The evidence adduced at trial, the sufficiency of which petitioner does not challenge, showed that petitioner arranged for the storage and concealment, as well as the sale and delivery, of some of the stolen television sets (see Tr. 506-548, 1614-1764).

ARGUMENT

1. Petitioner contends (Pet. 7-8, 11-12) that the trial court improperly allowed a government witness to testify that petitioner and two other co-conspirators transferred some of the stolen television sets onto vans from trailers on or about January 28 or 29, 1974, when these acts were not mentioned in either the government's bill of particulars or the indictment. This claim is without foundation.

On November 4, 1976, the district court ordered the government to specify the time, location, date, and defendants present at the commission of each of the 12 overt acts alleged in the indictment (Gov't App. D 11, 28).[2] The government provided the information for each

[1]Five co-defendants were also convicted of conspiracy; two others were acquitted. Three of the co-defendants convicted of conspiracy were also convicted of the underlying substantive offense; two co-defendants were acquitted of substantive offenses. See Pet. App. 3a.

[2]"Gov't App." refers to the appendix to the government's brief in the court of appeals.

overt act except the third (Pet. App. 2a, 26a-31a). Since the third overt act, unlike the others, alleged that the conspirators held a number of meetings from on or about January 15, 1974, through February 26, 1974, the government sought clarification of the court's order (Pet. App. 6a, 27a-28a). The district court stated that it was "aware that the information ordered as to the third overt act covers a six week period and compliance will require considerable effort," and it ordered the government to "disclose the date, time, location and defendants present *with as much specificity as is feasible*" (Gov't App. G 2; Pet. App. 6a) (emphasis supplied).

The government thereupon provided petitioner with information concerning 14 meetings held between January 15 and January 23, 1974 (Pet. App. 32a-35a)[3] but did not include information concerning petitioner's role in transferring the stolen merchandise on January 28 or 29, 1974. However, the district court made clear when it admitted evidence of unspecified overt acts that it had not intended its discovery orders to require the government to disclose every overt act it intended to prove.[4] And, as the court of appeals ruled (Pet. App. 7a-8a), the government's proof is not limited to the overt acts specified in the indictment,

[3]The government also furnished petitioner and his co-defendants prior to trial "copies of all documents which it intended to introduce into evidence" (Pet. App. 6a) and further agreed to "provide defendants with confessions, oral statements to government agents, recorded grand jury testimony and reports of physical or mental examinations and of scientific tests or experiments" (*id.* at 4a). The government also agreed to permit the defendants "to inspect or copy any of their tangible property within the Government's control" and to provide the defendants "with copies of their prior criminal records and a list of searches and seizures resulting in the acquisition of trial exhibits" (Pet. App. 4a-5a).

[4]The court stated, "I think to require that kind of specificity would * * * be an unreasonable burden on the Government. Under these circumstances, it doesn't seem to the Court that the Government should be required to set out every single detail with that kind of specificity * * *" (Tr. 756).

and a bill of particulars does not entitle a defendant to be apprised of additional overt acts. See, *e.g.*, *United States* v. *Bastone*, 526 F. 2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976); *Cook* v. *United States*, 354 F. 2d 529, 531 (9th Cir. 1965).

The government provided petitioner substantial information prior to trial. As the court of appeals properly concluded (Pet. App. 4a):

> [T]he trial judge himself was best equipped to rule whether his discovery orders were obeyed by the Government and he did so rule. We will not disturb his repeated statements that the Government had given defendants requisite discovery because his rulings were tenable. As his order of November 4 clearly indicates, he did not mean to order the Government to disclose all overt acts, including those not mentioned in the indictment.

This ruling is tied to the facts of this case, and further review by this Court is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Even assuming *arguendo* that the government's proof varied from the bill of particulars, petitioner would not be entitled to reversal of his conviction unless the variance prejudiced his right to a fair trial. *E.g.*, *United States* v. *Horton*, 526 F. 2d 884, 887 (5th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Glaze*, 313 F. 2d 757, 759 (2d Cir. 1963). As the court of appeals found (Pet. App. 8a-9a), the record shows no prejudice caused by the delay in disclosure from November 24, 1976, the date of the court's order, to December 6-18, 1976, the dates of petitioner's trial.

2. Petitioner also contends (Pet. 16-22) that the trial court improperly instructed the jury that it could convict petitioner on uncorroborated accomplice testimony if the

jury believed beyond a reasonable doubt that such testimony was true. Petitioner argues (Pet. 17-18) that application of such an instruction to exculpatory accomplice testimony, without telling the jury that they may also acquit the defendant on the basis of that testimony, was error that violated *Cool* v. *United States*, 409 U.S. 100 (1972), and conflicts with *United States* v. *Stulga*, 531 F. 2d 1377 (6th Cir. 1976). These claims are without merit.

Petitioner did not object to the court's instruction on accomplice testimony and did not request an alternative instruction (Tr. 2449-2458, 2686-2688). Thus, as the court of appeals properly held, petitioner's claim is not cognizable on appeal absent plain error. See, *e.g.*, *United States* v. *Vigi*, 515 F. 2d 290, 293 (6th Cir.), cert. denied, 423 U.S. 912 (1975).

In any event, petitioner concedes (Pet. 17) that the court's instruction would have been proper if it applied solely to inculpatory accomplice testimony. The court of appeals found (Pet. App. 14a) that the testimony of witnesses Lentini, Congales, Ladwig, and Campagna was in fact inculpatory and not exculpatory as petitioner contends (Pet. 19-20).

Lentini testified, *inter alia*, that he sold some of the stolen television sets at petitioner's request and gave the money to petitioner (Tr. 506-510, 527-531). Lentini also described petitioner's role in storing and delivering the stolen television sets (Tr. 468-495, 535-546).[5]

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[5]Petitioner's argument (Pet. 20) that Lentini's testimony was exculpatory because he initially told the FBI that on one occasion someone other than petitioner received the proceeds from the sale of some of the televisions is not well taken. Lentini retracted that statement and testified that petitioner in fact received the money. Lentini also testified that he misinformed the FBI to protect petitioner, who was his friend (Tr. 603-605).

The court of appeals also concluded that the testimony of Congales, Ladwig, and Campagna likewise was not exculpatory (Pet. App. 14a). They did not identify petitioner at trial as having assisted Lentini in delivering some of the stolen televisions, but this omission was due to their not having seen the individuals who helped Lentini unload the sets (Tr. 341-344, 383-385, 415-419, 448-463). They inculpated petitioner on other grounds (Pet. App. 14a).

In these circumstances, petitioner's reliance upon *Cool* v. *United States*, *supra*, and *United States* v. *Stulga*, *supra*, is misplaced. In *Cool*, the accomplice's testimony that he alone possessed and had knowledge of counterfeit bills and that the petitioner had nothing to do with the crime was wholly exculpatory. The accomplices in *United States* v. *Stulga*, *supra*, similarly exculpated the defendant by testifying that he had not participated in their illegal bond cashing scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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